United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,162

RONALD W. BRESNAHAN, Appellant

v.

DALE C. CAMERON, Appellee

Appeal from a Judgment of the United States District Court
for the
District of Columbia

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(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

Question Relating to Appellant's Original Commitment:

1. Particularly in light of a recent decision of the Supreme Court, did the mandatory commitment of the appellant to St. Elizabeths upon being found not guilty by reason of insanity deny to him the equal protection of the laws, when other classes of committed persons are entitled to a more rigorous demonstration of insanity before commitment?

Questions Relating to the Release Proceeding:

2. Did the District Court err in denying appellant's request for an independent mental examination by the Commission on Mental Health where (1) appellant had been confined in St. Elizabeths for almost four years and his only previous examination was seventeen months prior to the request in this proceeding, and (2) the testimony at the hearing indicated that appellant was in greatly improved condition?

3. Where a person found not guilty by reason on insanity seeks habeas corpus to obtain his release, was it error to require proof that the Superintendent of St. Elizabeths is being arbitrary and capricious in refusing to certify petitioner for release?

4. Applying correct standards, did the appellant meet his burden of proof for obtaining release, where the evidence demonstrated that he had recovered his sanity?

RONALD W. BRESNAHAN,

Appellant,

v.

DALE C. CAMERON,

Appellee.

INDEX

TABLE OF CASES AND OTHER AUTHORITIES

CONSTITUTIONAL AMENDMENTS, STATUTES AND RULES

The * denotes cases on which primary reliance is placed.

MISCELLANEOUS AUTHORITIES

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Columbia discharing a writ of habeas corpus, dismissing the petition therefore, and remanding the petitioner to custody of the Superintendent of St. Elizabeths. (Habeas Corpus No. 165-65.) The District Court had jurisdication under D.C. Code § 16-801 and 28 U.S.C. § 2241.

Application for leave to appeal was timely made and granted. This Court has jurisdiction to hear the appeal under 28 U.S.C. §§ 1291, 1294, 1915.

STATEMENT OF THE CASE

A. Background

The appellant, Ronald W. Bresnahan, is a twenty-nine-year-old, single male, who was born and spent his early life in upstate New York (Tr. 31, 42). Though his early life was scarred by periods in reformatories, he has earned his livelihood aa a waiter and cook and, at one point, as assistant manager of a restaurant in New York City (Tr. 32). At the age of twenty-four, he moved to the District of Columbia. Shortly thereafter, he was arrested and, on July 10, 1962, found not guilty by reason of insanity of robbery, assault with intent to commit robbery, carrying a dangerous weapon and assaulting a police officer with a dangerous weapon. (District Court for the District of Columbia, Criminal Case Nos. 120-62 and 121-62 (Tr. 7).) Pursuant to D.C. Code Section 24-301(d), he was thereupon committed to St. Elizabeths Hospital, without a hearing or other proceeding to determine his sanity at the time of commitment. He has been in the custody of that institution ever since.

On March 31, 1966, Mr. Bresnahan filed in the United States District Court for the District of Columbia a "Petition For Issuance For a Writ of Habeas Corpus," asserting that he had recovered his sanity and seeking both an independent mental examination and his immediate

release from the custody of Dr. Dale Cameron, Superintendent of St. Elizabeths Hospital.

Dr. Cameron, in his Return to the Order to Show Cause Why the Writ of Habeas Corpus Should Not Issue, denied the allegations of the petitioner and denied that he was being arbitrary and capricious in refusing to certify petitioner for release.

B. The Hearing in the District Court

On April 18, 1966, a hearing on appellant's petition was held in the United States District Court for the District of Columbia before the Honorable Alexander Holtzoff. (Habeas Corpus No. 165-66). At this hearing two witnesses were called -- Dr. George Weichardt, testifying for the government, and the petitioner, Ronald Bresnahan, testifying in his own behalf.

Despite the District Court's ruling that the petitioner bore the burden of proof in this proceeding (see Findings of Fact and Conclusions of Law), the government was called upon to present its case first (Tr. 7-8). Dr. Weichardt, a specialist in neurology and psychiatry, testified that since July 1965, he had been supervisor of the ward in which the appellant is presently held and that he had known appellant since that time (Tr. 9). Drawing upon information from the records of the hospital, Dr. Weichardt testified that the petitioner

was diagnosed in 1962 as suffering from schizophrenic reaction (Tr. 10). This illness manifested itself through tension, confusion and difficulty in memory (Tr. 12-13), and also through a "tremendous hostility" toward the police because of a delusional idea that a police officer had killed his father (Tr. 13-15).

Since 1962, however, according to Dr. Weichardt, the petitioner's schizophrenic reaction had been in "remission" in the sense that "it has subsided to a considerable extent and is not clinically evident at this time" (Tr. 10-11, 24). During this four-year period, Dr. Weichardt stated, there have been only a few incidents "that would raise a question in your mind as to flare-ups" of his schizophrenia, and the last of these occurred in 1964 (Tr. 24-25). Even these incidents, according to the doctor, did not necessarily indicate that the petitioner had gone back into a state of psychosis because right after each incident, he appeared "as well as he is now" (Tr. 25).

Around October 1, 1965, Mr. Bresnahan was transferred from maximum security quarters to the "Annex," a ward where there was considerably less restriction on his freedom and where he was able to engage in a vocational rehabilitation program (Tr. 23). On November 16, 1965, he escaped from St. Elizabeths (Tr. 28) and traveled to New York. There, on the following day, he suffered a stroke and was taken to Bellevue Hospital

(Tr. 11, 24). In mid-December he was returned to maximum security confinement in John Howard Pavilion at St. Elizabeths, where he has been ever since (Tr. 27). Since his return, the petitioner's attitude, according to Dr. Weichardt, has been "one of anger rather than of mental illness" and "he has been uncooperative and has refused to become engaged again in any treatment program" (Tr. 10).

Dr. Weichardt's expert opinion was that "in view of the long history of getting into trouble" there is "a probability" that Bresnahan might get into the same sort of troubles again (Tr. 17). He also thought that Bresnahan ought to enter into an education rehabilitation program (Tr. 27). Nevertheless, he conceded that petitioner is not now psychotic (Tr. 9) and does not now, nor has he for some time, evidence indications of the schizophrenic reaction for which he was committed in 1962 (Tr. 26).

Testifying on his own behalf, the petitioner admitted that he had once had delusional ideas and had been nervous, but asserted that he had willingly participated in all programs offered to him and had responded well to treatment (Tr. 32-33). He had, in fact, not been on drug treatment of any sort for several years (Tr. 41). He pointed out that he had served as art director of the hospital magazine for three years (Tr. 32). His reasons

for eloping from St. Elizabeths, he said, had been only so that he could help his mother who was seriously ill and unable to take care either of herself or of his sister (Tr. 35-36). He stated that while at Bellevue receiving treatment, psychiatrists there had concluded that he was sane (Tr. 38). In conclusion he felt that if released from the hospital he would not be a danger to himself or to others*/ (Tr. 41-42).

At the conclusion of the evidence, the District Judge discharged the writ, holding that he could "find no basis for concluding that the Superintendent of St. Elizabeths is acting arbitrarily or capriciously in refusing to certify this Petitioner for release" (Tr. 47). Petitioner's counsel renewed his earlier request (Tr. 7) for an independent examination by the Mental Health Commission, but the court refused to direct it stating

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*/ Evidence was also introduced to the effect that the petitioner had two years to serve on a sentence in New York since he had violated parole in that state and that if released from St. Elizabeths he would be turned over to the custody of New York prison officials (Tr. 40-41). Since this hearing, the petitioner has received notice that he has been fully discharged from the jurisdiction of the Board of Parole of New York because of an alteration in New York law whereby time spent by parole violators in mental hospitals is credited against their sentences. (Certificate of Russell G. Oswald, Chairman, New York State Board of Parole.)

that it only granted such examinations in "cases which are very borderline or cases in which I have some doubt," and that "he wouldn't dream of making a finding" that the Superintendent's actions were arbitrary and capricious (Tr. 48).

On the day following the hearing, the court entered Findings of Fact and Conclusions of Law stating that the Superintendent had not been shown to be "arbitrary and capricious" in refusing to certify the petitioner for release and also that the evidence proved that petitioner is "suffering from a mental disorder, that is, schizophrenic reaction, chronic undifferentiated type and is likely to be dangerous to himself or others if released into the community." Accordingly, Judge Holtzoff remanded the petitioner to the custody of the Superintendent.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment V (in part):

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

D. C. Code, Section 24-301(d):

> If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

D. C. Code, Section 24-301(e) (in part):

> Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, . . . such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined . . . ; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing. . . . [I]f the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from future confinement in said hospital. . . .

D. C. Code, Section 24-301(g):

> Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus.

STATEMENT OF POINTS

I. The appellant is being illegally held because his mandatory commitment denied him equal protection of the laws.

II. The District Court erred in refusing appellant's request for an independent mental examination by the Commission on Mental Health.

III. The District Court applied incorrect standards for determining the appellant's eligibility for release.

IV. The District Court erred in refusing to grant appellant's release, since appellant had met his burden of proof under the standards set forth in Part III.

SUMMARY OF ARGUMENT

I.

In 1962, upon being found not guilty by reason of insanity, the defendant was mandatorily committed to St. Elizabeths. The standards for committing persons to institutions upon being found not guilty by reason of insanity are less rigorous than those required for committing other classes of persons. The Supreme Court, in Baxstrom v. Herold, 383 U.S. 107 (1966), held that when the issue to be determined is "whether a person is mentally ill at all," there was no reasonable justification for applying different standards to different classes. Accordingly, the District of Columbia

mandatory commitment statute (D.C. Code § 24-301(e)) is unconstitutional to the extent that it permits holding a person such as the appellant beyond such reasonable time after trial as is necessary for examining him and holding a hearing at which the Government proves his present mental illness.

II.

The District Court denied appellant's request for an independent mental examination. A decision of this Court clearly requires that such examination be granted in cases such as that at bar in which the petitioner has not had such an examination in over a year. Watson v. Cameron, 114 U.S. App. D.C. 151, 312 F.2d 878 (1962). Moreover, an examination was required in this case because the evidence tended to show that the defendant no longer had a mental illness by reason of which he might be dangerous.

III.

The District Court held that in order to be eligible for release, a petitioner must prove that the Superintendent of St. Elizabeths has been arbitrary and capricious in refusing to certify him for release. Under the decisions of this Court - and in the light of constitutional considerations including procedural due process and equal protection of the laws -- no such proof is required. The only relevant question is whether there is "freedom from such abnormal mental condition as would make the individual dangerous to himself or others in the reasonably foreseeable future." Overholser v. Leach, 103

U.S. App. D.C. 289, 257 F.2d 667 (1958), cert. denied, 359 U.S. 1013 (1959).

IV.

When the correct standard for release is applied, the District Court's refusal to release the petitioner is found to be erroneous. The evidence demonstrated that the petitioner, once diagnosed as schizophrenic reaction, has not shown any indication of that illness for several years and if released, would not be dangerous to himself or the community by reason of that illness.

ARGUMENT

I. The Petitioner Is Being Illegally Held Because the Mandatory Commitment Provisions of D.C. Code Section 24-301(d) Unconstitutionally Denied Him Equal Protection of the Laws Under the Due Process Clause of the Constitution

In its recent decision in Baxstrom v. Herold, 383 U.S. 107 (1966), the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prevented the state of New York from committing to mental institutions those becoming insane while serving in prison on a lesser showing of insanity than was required for committing all other classes to similar institutions. This decision, by its holding and by its broad language, necessitates a comparable holding that the District of Columbia mandatory commitment statute*/ is unconstitutional; by this statute, persons such as the appellant are automatically committed to mental hospitals upon being found not guilty by reason of insanity, without ever according them a hearing at which their commitment turns on a finding of the same degree of present mental illness required for committing other classes to the same institution. The Baxstrom decision thus undercuts the

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*/ D.C. Code § 24-301(d) (1961): If any person tried upon an indictment or information for an offense . . . is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

premises and conclusions of the decision of this Court in Ragsdale v. Overholser, 108 U.S. App. D.C. 308, 313-14, 281 F.2d 943, 948-49 (1960), which upheld the mandatory commitment procedure against an attack that it resulted in a deprivation of liberty without due process of law, but did not consider the constitutional issues raised by applying less protective commitment standards for criminal defendants than for other classes of persons claimed to be mentally ill.

The procedural discrimination held unconstitutional in the Baxstrom case was as follows: Under New York law, a person alleged to have become insane while serving a sentence in prison, could be transferred to the custody of the Department of Mental Hygiene beyond the term of his sentence upon a finding by a Surrogate that the person "may require mental care and treatment." 283 U.S. at 108-109. By contrast, all other persons committed through ordinary civil commitment processes were entitled to de novo review by jury trial of any administrative determination that they were insane. If the jury returned a verdict that the person was sane, he was entitled to immediate discharge.

The state of New York tried to justify the discrimination as based on a reasonable classification. It claimed that it was reasonable to differentiate "the civilly insane from the 'criminally insane' " since the latter had demonstrated "dangerous or criminal tendencies." Id. at 111. The Court rejected this classification as applied to the

question of commitment. In language of extraordinary significance in the context of the case at bar, the Court stated:

> "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. Walters v. City of St. Louis, 347 U.S. 231, 237. Classification of mentally ill persons as either insane or dangerously insane may be a reasonable distinction for determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill at all." Ibid. (Emphasis added, except for last two words which were emphasized in original.)

Similarly, while it may be proper for the District of Columbia to treat the civilly committed differently from those found not guilty by reason of insanity as to the place or nature of treatment, there is no justification for granting one group procedural protections denied another when the issue for determination is mental illness "at all."

Such constitutionally impermissible distinctions are drawn under the District of Columbia Code. Persons found not guilty by reason of insanity are committed without further hearing to St. Elizabeths Hospital despite the fact (1) that the trial jury is instructed to return a verdict of not guilty even if there is merely a reasonable doubt as to sanity and (2) the jury's finding relates to the time of the commission of the offense not to the time of trial. See Lynch v. Overholser, 369 U.S. 705, 713 (1962); Cameron v. Fisher, 116 U.S. App. D.C. 9, 11-12, 320 F.2d 731, 733-34 (1963).

A person committed civilly, on the other hand, has a right to a hearing before the Commission on Mental Health on the issue of present mental illness and to immediate discharge if it is determined that he is not mentally ill. (D.C. Code § 21-544 (Supp. V, 1966).) He is further entitled to de novo review by jury trial in the District Court of any determination that he is mentally ill. (D.C. Code § 21-545 (Supp. V, 1966).) If it is then found that he is presently mentally ill and, "because of that illness, likely to injure himself or others if allowed to remain at liberty," the court may order him hospitalized or order any other treatment which it believes in the best interests of the person or the public. (§ 21-545(b) (Supp. V, 1966)); see also Lake v. Cameron, No. 18,809, at p. 5 (D.C. Cir., May 19, 1966).) Similarly protective standards are provided for those hospitalized as sexual psychopaths. A sexual psychopath is defined as a person "who by a course of repeated misconduct in sexual matters has evidenced such lack of power to control his sexual impulses as to be dangerous to other persons." (D.C. Code § 22-3503(1).) Despite their criminal proclivities, those alleged to be sexual psychopaths are entitled to a jury determination, by a preponderance of the evidence, as to their present inability to control their impulses. (D.C. Code § 22-3508.)

The disparity between the standards for commitment of those found not guilty by reason of insanity and those

committed civilly or committed as sexual psychopaths is as pronounced as the disparity of standards the Supreme Court found in the New York Procedure. Just as it was impermissible for New York to commit those completing prison sentences on a finding that they "may require care and treatment" when others were entitled to a finding of insanity by a preponderance of the evidence, so likewise it is impermissible for the District of Columbia to commit criminal defendants on a finding that there is a "reasonable doubt as to sanity" when all others must be proved insane by a preponderance of the evidence. Conceivable distinctions between the class discriminated against in New York and the class discriminated against in the District of Columbia prove insubstantial.

To the contention that persons found not guilty by reason of insanity can be classified differently because, unlike other classes, their incarceration arises out of a criminal proceeding, the most succinct answer is that this Court has repeatedly said that Congress's purpose in committing those not guilty by reason of insanity is the same as it is for all other classes of insane persons - - not criminal punishment but rather protection of the public and treatment of the individual. See, e.g., Ragsdale v. Overholser, 108 U.S. App. D.C. 308, 312, 281 F.2d 943, 947 (1960).

To the contention that a lower standard for commitment is permissible for persons of the class of the

petitioner since they have demonstrated conclusively their dangerousness, the answer is that Baxstrom clearly demonstrates that while this distinction may be relevant for some purposes, it has no place where the issue is the degree of proof required in determining "whether a person is mentally ill at all." 383 U.S. at 111 (emphasis in original). Moreover, the standards for the commitment of sexual psychopaths demonstrates that the District does accord procedural protections to some who have clearly demonstrated antisocial tendencies.*/

Finally, to the argument that the discrimination is justified because it is an unnecessary burden on the State to bear the expense and consumption of time entailed in two proceedings, it is sufficient to answer that the Supreme Court has rejected administrative inconvenience as a permissible excuse for permitting important liberties to be jeopardized. (See, e.g., Jackson v. Denno, 378 U.S. 368 (1964) (holding that a two-step determination of the voluntariness of a confession was constitutionally required);

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*/ New York tried to justify its procedure on a similar distinction. The court said whatever the merits of this distinction might be in some contexts, it cannot be relied upon by New York since the State grants full protection to those who have prior records but are not currently in jail. 383 U.S. at 114-115. This is precisely comparable to the disparity in the District between those found not guilty by reason of insanity and those claimed to be sexual psychopaths.

Schneider v. Rusk, 377 U.S. 163 (1964) (holding that administrative convenience was insufficient justification for removing citizenship from naturalized citizens who return to their country of birth).)

Nor does this conclusion of unconstitutionality present any threat to the safety of the community. While the Baxstrom decision requires a holding that discrimination in the degree of proof required for commitment in the District of Columbia is unconstitutional, it does not follow that upon being found not guilty by reason of insanity, a person is entitled to his immediate release until proceedings can be brought for this commitment. The jury's verdict necessarily implies a doubt as to sanity in the not-too-distant past; this doubt is constitutionally sufficient justification for temporary incarceration until there has been a reasonable time to determine whether the defendant continues to be mentally ill. Indeed, D.C. Code, Section 21-528 (Supp. V, 1966) permits such temporary incarceration of those whom the State is seeking to commit civilly.

But after such time has passed as is necessary for testing, Baxstrom requires some sort of proceeding at which the Government demonstrates, by a preponderance of the evidence, that the defendant is presently mentally ill. */

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*/ That the Constitution requires such a proceeding was also suggested by Judge Fahy prior to Baxstrom. See Ragsdale v. Overholser, 108 U.S. App. D.C. 308, 315, 281 F.2d 943, 950 (concurring opinion).

This proceeding can adequately protect the public against the dangerously mentally ill, since the evidence of the person's recent antisocial act will remain of significance not only in the decision as to present illness but also in the decision as to future dangerousness as a result of that illness.

Equal Protection in the federal context - - in which it is a phase of Due Process under the Fifth Amendment - - is an expansive concept. See Bolling v. Sharpe, 347 U.S. 497 (1954). It demands in some contexts equivalents not identities. Accordingly, a conceivably permissible alternative to a formal commitment proceeding would be to interpret the sections of the District of Columbia Code relating to release as establishing an adequate means, with the same procedural protections, of determining the original commitment question of whether the person presently has a mental illness or abnormal mental illness by reason of which he might be dangerous.*/ In particular, habeas corpus might be a reasonable alternative to a new commitment proceeding so long as no proof of arbitrary and capricious action is required and so long as the burden of

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*/ Focusing more specifically on policy than on the constitutional doctrines discussed here, almost all the many critics of the statutory progeny of Durham have considered the standards for commitment inseparable from the standards for release and have framed recommendations for alleviating the effect of the former through appropriate changes in the latter. See, e.g., Krash, The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia, 70 Yale L.J. 905, 940-48; Bishop, Book Review, 78 Harv. L. Rev., 1510, 1515-17 (1965).

proof is not placed upon him. If the issue before the court is simply whether the person before it is suffering from an abnormal mental condition, it makes little difference whether the proceeding is labelled as "commitment" or "release."

As is stated above, the decision of the court in Ragsdale v. Overholser, 108 U.S. App. D.C. 308, 281 F.2d 943 (1960), held that the mandatory commitment procedure was constitutional under the due process clause because it permitted retention until it could be determined whether the person was ill and, at that point, habeas corpus was an adequate release mechanism.*/ In the light of Baxstrom this view is no longer tenable without a modification of the standard for release in habeas corpus proceedings. Part of the inadequacy of the Ragsdale reasoning lay in its apparent assumption that concepts of due process and procedural protection had little place when the statutory program has the purpose of treatment rather than punishment. Baxstrom clearly decides this question in favor of the protection of procedural rights. Indeed, citing Baxstrom in a later equal protection case last Term, the Supreme Court stated, "we have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause,

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*/ In Foller v. Overholser, 110 U.S. App. D.C. 239, 241, 292 F.2d 732, 734, this Court refused to reconsider its holding in Ragsdale.

classifications which might invade or restrain them must be closely scrutinized and carefully confined." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966).

Accordingly, the decision of the District Court should be reversed, with this Court ordering one of two procedures to follow:

(1) a proceeding, equivalent to the civil commitment or sexual psychopath proceeding, initiated by the Government, at which the issue is whether the petitioner presently suffers from an abnormal mental condition by reason of which he may be dangerous; or

(2) a new hearing in the habeas corpus proceeding in which the burden of proof - as in commitment proceedings - is on the Government and the issue is whether the petitioner presently suffers from an abnormal mental condition by reason of which he may be dangerous. */

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*/ If the court selects procedure (1), the Baxstrom decision will still require that release standards are available equivalent to those in civil commitment and sexual psychopath proceedings. See Part III. Such standards would permit placing of the burden of proof on the petitioner, if such a burden is placed on other classes of persons committed to St. Elizabeths.

II. The District Court Erred In Refusing Petitioner's Request For an Independent Mental Examination by the Commission on Mental Health

Twice during the course of the hearing before the District Court, petitioner's counsel requested that the petitioner be granted an independent mental examination by the Commission on Mental Health (Tr. 7 and 48; see also petitioner's "Petition for Writ of Habeas Corpus"). The District Judge refused this request, stating:

> "I am not going to direct that. I grant an independent examination in two types of cases: Cases that are very borderline or cases in which I have some doubt. But here I wouldn't think of overruling the Superintendent of St. Elizabeths Hospital and making a finding that his action is arbitrary and capricious." (Tr. 48)

The District Court's refusal was reversible error under the rule enunciated by this Court in Watson v. Cameron, 114 U.S. App. D.C. 151, 312 F.2d 878 (1962) and was an abuse of discretion under that case and others. */

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*/ In addition, the District Court, for the reasons stated in Part III of this brief, applied the wrong standard, since his decision as to whether to grant an examination was affected by his erroneous belief that he had to find on the merits arbitrary and capricious conduct by the Superintendent. Since, however, the petitioner was entitled to an independent examination as a matter of right, there is no necessity for remand to the District Court for application of a correct standard.

The statute establishing the Commission on Mental Health permits the District Courts to draw on the Commission for aid in court proceedings. (D.C. Code, §§ 21-502, 21-503 (Supp. V, 1966) (substantially reenacting § 21-308 (1961 ed.).) It was enacted "in recognition of the fact that the assistance of unbiased experts was essential to assist courts in dealing with insanity cases." DeMarcos v. Overholser, 78 U.S. App. D.C. 131, 132, 137 F.2d 698, 699 (1943).

In Watson v. Cameron, supra, this Court considered for the first time the circumstances in which a person found not guilty by reason of insanity and seeking release is under this statute entitled to an examination by the Commission as a matter of right. Dealing with a person who had been held in St. Elizabeths for slightly less than a year and one half, the Court held that:

> "[A]n independent examination by an expert appointed by the District Court shall be ordered as a matter of right (a) where no such examination has previously been granted and (b) where the movant has been confined in the hospital for a substantial period such as here where the confinement has been more than one year." (114 U.S. App. D.C. at 152; 312 F.2d at 879)

The Watson opinion, moreover, made clear, to the extent possible on the facts before it, that there is a right to an examination whenever factor (a) or factor (b) exists, since

in conclusion, the Court stated:

> "We hold only [that] where, as here, a person is confined for more than one year without such an examination he is entitled as a matter of right to an independent examination to test the findings and conclusions of the hospital staff where he is confined." (114 U.S. App. D.C. at 153, 312 F.2d at 880.)

At the time of the hearing in this case, petitioner had been confined in St. Elizabeths Hospital for nearly four years, during which time he had been accorded only one independent mental examination. This examination took place on October 29, 1964,*/ over seventeen months before appellant filed his petition for habeas corpus in this case. Thus, the period of time since the petitioner's prior examination was as long as that during which the petitioner in Watson had gone without an examination. No viable distinction seems possible between one examination in four years and no examination in a year and one half. Accordingly, in the words of the Watson case since the petitioner had been "confined for more than one year without such an examination" he was entitled to such examination "as a matter of right."**/

*/ In the course of Habeas Corpus No. 304-64.

**/ Only one decision has been rendered by this Court since Watson dealing with the right to independent examinations for those seeking release after commitment upon being found not guilty by reason of insanity. In Green v. United States, 121 U.S. App. D.C. 226, 349 F.2d 203 (1965)(en banc), this Court dealt with the unusual instance in which a patient of St. Elizabeths was opposing his release (because if released, he was to be sent to jail). The Court held, on the facts, that the petitioner had a right to an examination.

The Court in Watson carefully avoided deciding whether all petitioners were entitled to an independent examination as a matter of right, or whether, short of that, there were circumstances other than those posed in the Watson case when an examination becomes a matter of right. 114 U.S. App. D.C. at 152-53; 312 F.2d at 879-80. For several different reasons posed in all cases of petitions by those found not guilty by reason of insanity, this Court could reasonably hold that an independent examination was required whenever requested in a properly commenced habeas corpus proceeding:*/ those found not guilty by reason of insanity do

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*/ In Curry v. Overholser, 109 U.S. App. D.C. 283, 287 F.2d 137 (1960), the Court dealt with the right to an independent mental examination for those found not guilty by reason of insanity when, unlike thise case, no request for an examination had been made at the hearing. The Court there stated:

> "Appellant, an indigent, argues that he is hampered . . . by not having available to him private psychiatrists to testify as to his present mental condition. . . . We think this relief is available to all indigent inmates of the hospital, including those committed under Section 24-301. No such relief was requested in this case . . ."
> (109 U.S. App. D.C. at 286; 287 F.2d at 140; emphasis added)

Though the Watson Court stated that it was dealing for the first time with the standards in cases involving persons found not guilty by reason of insanity who requested examinations, the language of Curry can be seen as either creating a right to an examination in all cases, or, at the least, as indicating that an examination should almost never be denied.

not have the right that those civilly committed have to a current examination of their mental condition every six months by a duly qualified physician (see D.C. Code § 21-546 (Supp. V, 1966));*/ persons found not guilty by reason of insanity tend to spend much greater lengths of time in St. Elizabeths than other classes of patients before the Superintendent is willing to certify them for release (Judicial Conference of the District of Columbia Circuit, Report of the Commission on Problems Connected with Mental Examinations of the Accused in Criminal Cases, Before Trial 86, and Table 24, at 170 (1965)); persons found not guilty by reason of insanity are admitted to St. Elizabeths on a lesser showing of insanity that other classes (see discussion, supra, Part I); and, finally, as in all cases involving patients seeking release, "the right to bring habeas corpus would be of little value to an indigent person unless expert testimony were available to him to rebut the opinion evidence of the staff of St. Elizabeths who believed he should be continued in custody." (DeMarcos v. Overholser, 78 U.S. App. D.C. 131, 132, 137 F.2d 698, 699 (1943).

Even if this Court does not choose to go so far as to require independent examinations in all cases in which they are requested, a further reason exists beyond the clear

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*/ Consider in this regard, the arguments raised as to equal protection of the law in Part I, supra, and Part III (B), infra.

requirements of the Watson case for holding that the petitioner here was entitled to an independent examination as a matter of right.

The facts presented at the hearing indicated, at the least, considerable doubt as to the propriety of retaining the petitioner in custody. In the Watson case, supra, an independent mental examination was held to have been a matter of right despite the fact that the evidence produced at the hearing, as stated in the opinion of the court, indicated that the appellant was presently suffering from "chronic brain syndrome, secondary to a convulsive disorder with psychoses," and "had paranoid illusions of persecution, was confused at times and unable to control his impulses." 312 F.2d at 879.

By contrast, in the case at bar, the uncontested testimony of the psychiatrist at St. Elixabeths was that while the petitioner had been diagnosed as schizophrenic reaction, such illness had been in a state of remission for several years (Tr. 10-11, 24). Moreover, the petitioner was no longer psychotic (Tr. 10), and did not at the time of the hearing, or for some time past, evidence any indication of the psychotic or schizophrenic behavior for which he was committed in 1962 (Tr. 26). Indeed, no incidents even suggesting a "flare-up" of the patient's schizophrenia had occurred in the seventeen months since the petitioner's only preceding independent examination (Tr. 24-25; the last of

these incidents occurred July 10, 1964 (Return or Order to Show Cause Why the Writ of Habeas Corpus Should Not Issue, p.2).) Thus, the borderline nature of this case, despite the District Court's assertions to the contrary, required an independent examination. If such an examination was required in Watson despite the fact that the petitioner was said to be in an active state of mental illness, it was required a fortiori in this case where the evidence was uncontestedly to the contrary.*/

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*/ The District Judge stated that he ordered examinations only in cases that are "very borderline or cases in which I have some doubt." (Tr. 48) Unable to determine if this was a viable standard for deciding whether to order independent examinations, petitioner's counsel asked Dr. John M. Davis, a psychiatrist of Bethesda, Maryland, and his wife Dr. Judith M. Davis, a psychiatric resident, to read the transcript in this case. They raised questions which appellant's counsel on appeal did not perceive but which an independent examination might have brought to the attention of the court.

In particular, they were interested in knowing more about the reasons for refusing to release a person who, though diagnosed as schizophrenic, had not been on drugs for several years (Tr. 41) and had not had any serious relapses (Tr. 24-25). Recent studies have indicated that group therapy or psychotherapy without drug treatment is generally much less effective than drug treatment alone and drug treatments combined with psychotherapy (see Gorham and Pokormy, Effect of Phenothiazine and/or Group Psychotherapy With Schizophrenics, Diseases of the Nervous System, Vol. 25 pp. 75-86 (Feb. 1964) and also that relapses increase significantly once drug treatment of schizophrenics is discontinued. (Davis, Efficacy of Tranquilizing and Antidepressant Drugs, 13 Archives of General Psychiatry 552, 555 (1965).) They were also struck by the fact that a person as young as the petitioner -- then 28-years-old -- had suffered a stroke (Tr. 14) and wondered whether thorough examinations had been undertaken to discover whether petitioner's original antisocial conduct and tendencies could have stemmed from physical, rather than mental, disorders. (Continued on next page)

Because the Watson case is controlling and because of the additional factors discussed above, this case should be remanded to the District Court with a direction to order an independent medical examination by the Commission on Mental Health, after which a new hearing should be held in the light of the facts there adduced and in the light of the facts transpiring since the original hearing. See Watson v. Overholser, 114 U.S. App. D.C. 151, 153, 312 F.2d 878, 880 (indicating that since more than six months has passed since the original hearing, the new hearing should consider both the evidence produced by the examination and any other more recent evidence.)

III. The District Court Applied Incorrect Standards For Determining the Petitioner's Eligibility For Release

At the conclusion of the hearing, the District Court dismissed the petition, stating that he could "find no reason for concluding that the Superintendent of St. Elizabeths is acting arbitrarily or capriciously in refusing to certify this petitioner for release" (Tr. 47). Repeatedly throughout the hearing, the trial judge stressed that prior

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*/ continued. (See e.g., Redlich & Freedman, The Theory and Practice of Psychiatry 601-02 (1966); Gunter & Bucy, Neurology 392, 569 (1959).) Dr. John Davis has been kind enough to read this footnote in order to render accurate counsel's reporting of their questions.

to releasing any person found not guilty by reason of insanity, he must find arbitrary and capricious action on the part of the Superintendent in refusing to certify the petitioner for release (Tr. 6, 29-30, 47-49). In so doing, the District Judge was applying an erroneous standard.

Under the case law in this jurisdiction and under a reasoned interpretation of section 24-301(g) of the District of Columbia Code in light of the dictates of the Constitution, no finding as to arbitrariness and capriciousness of the Superintendent in refusing to certify is required. The only question the District Court should have answered -- giving, of course, appropriate probative weight to the opinions of the staff of St. Elizabeths -- was whether there is "freedom from such abnormal mental condition as would make the individual dangerous to himself or to the community in the reasonably foreseeable future." Overholser v. Leach, 103 U.S. App. D.C. 289, 273 F.2d 667 (1958), cert. denied 359 U.S. 1013 (1959).

A. The Case Law

In 1955, the District of Columbia Code was amended in response to the decision of this Court in Durham v. United States, 94 U.S. App. D.C. 227, 214 F.2d 862 (1954), to provide for mandatory commitment to St. Elizabeths of those found not guilty of crime by reason of insanity. (§ 24-201(d)) Release of such persons was to be permitted after the Superintendent of St. Elizabeths certified that the person had recovered his sanity, that he would not in the reasonably foreseeable future be

dangerous to himself or others, and that he is entitled to release. (§ 24-301(e)). Nothing was explicitly provided as to the standard for release in cases in which there was no certification, except that the remedy of habeas corpus was expressly preserved. (§ 24-301(g)).

In Overholser v. Leach, 103 U.S. App. D.C. 289, 257 F.2d 667 (1958), cert. denied, 359 U.S. 1013 (1959), this Court dealt for the first time after the enactment of this statute with the standard to be applied in proceedings brought by persons found not guilty by reason of insanity whom the Superintendent refused to certify for release. The Court held that the District Courts, before ordering release, must find that there is "freedom from such abnormal mental condition as would make the individual dangerous to himself or others in the reasonably foreseeable future." 103 U.S. App. D.C. at 292, 257 F.2d at 670 (footnotes omitted). In an earlier part of the same opinion, however, the Court stated that the petitioner had "failed to carry his burden of showing that the refusal of the Superintendent to issue the statutory certificate was arbitrary and capricious." 103 U.S. App. D.C. at 291; 257 F.2d at 669.

The Leach case left somewhat unclear whether proof both of arbitrary and capricious conduct and of freedom from an abnormal mental condition were required. Until the most recent decision in the area, Overholser v. O'Beirne, 112 U.S. App. D.C. 267, 302 F.2d 852 (1962), some unclarity remained: Two intervening cases relied on Leach and mentioned a necessity for

proof of "arbitrary and capricious" action.*/ Each of these, also, however, gave equal stress to proof of "freedom from such abnormal mental condition . . ." and neither indicated the relationship between them. Two other cases interpreted Leach as requiring proof only of "freedom from such abnormal mental condition as would cause the individual to be dangerous to himself or others in the reasonably foreseeable future." Each stated the standard unequivocally and did not mention proof of "arbitrary and capricious" action.**/

The O'Beirne, supra, decision finally resolved the uncertainties left by Leach. The Court of Appeals there

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*/ Ragsdale v. Overholser, 108 U.S. App. D.C. 308, 281 F.2d 943 (1960); Overholser v. Russell, 108 U.S. App. D.C. 400, 283 F.2d 195 (1960). A third decision, Foller v. Overholser, 110 U.S. App. D.C. 239, 292 F.2d 732 (1961), affirmed, without commenting on the standard to be applied, a lower court's finding that the Superintendent had not been arbitrary and capricious and that the petitioner had not recovered his sanity.

**/ Rosenfield v. United States, 104 U.S. App. D.C. 322, 262 F.2d 34 (1958); Hough v. United States, 106 U.S. App. D.C. 192 271 F.2d 458 (1959). In Hough, for example, the Court stated:

> "Overholser v. Leach, 1958, 103 U.S. App. D.C. 298, 257 F.2d 667, 669, a habeas corpus proceeding, involved construction of the finding required for unconditional release . . . . We construed the statute to require "freedom from such abnormal mental condition as would make the individual dangerous to himself or the community in the reasonably foreseeable future." (106 U.S. App. D.C. 192, 195, 271 F.2d 458, 461 (1959).)

reversed a District Court judgment granting release to a person found not guilty by reason of insanity, finding certain factual conclusions "clearly erroneous" when viewed in the light of the appropriate standards for release. Speaking for the Court, Judge Burger stated:

> "Under standards established in a series of cases beginning with Overholser v. Leach, we have construed § 24-301(g) as requiring the petitioner who seeks release without the statutory medical certification of recovery to show (1) that he has recovered his sanity and (2) that such recovery has reached the point where he has no abnormal mental condition which in the reasonably foreseeable future would give rise to danger to the petitioner or to the public in the event of his release." (112 U.S. App. D.C. at 269; 302 F.2d at 854) (footnote omitted).

At four other points in the course of its exhaustive opinion, the Court re-enunciated those standards in similar terms. 112 U.S. App. D.C. at 270, 271, 273 (text at n.14), 275, 302 F.2d at 855, 856, 858 (text at n.14), 860. Nowhere in the Court's opinion was a requirement of proving arbitrary and capricious conduct mentioned as part of the standard to be applied.

Nevertheless, it must be conceded that despite the repeated assertions of the Court in O'Beirne as to the proper standard, this Court has never explicitly declared that no

proof of arbitrary and capricious action is required. In the light of the clear statements of standards in O'Beirne, such an explicit declaration should be unnecessary.*/ But the District Court in this case -- and other district courts in other cases**/ -- have felt obligated to make a finding as to arbitrariness and capriciousness. These district courts are applying an erroneous standard. In remanding this case for application of correct standards, this Court will thus both be giving recognition to the effect of its own decisions and providing a necessary aid to petitioners and their counsel in order that they may know what standards must be met.

B. Constitutional and Policy Considerations

Reasons other than stare decisis compel the conclusion that any requirement for proving arbitrary and capricious

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*/ Even in the O'Beirne decision, the Court twice referred to or quoted findings of district courts which included references to "arbitrary and capricious" action. In each instance, the Court was contrasting or comparing the district court's standards with the standard which the Court of Appeals considered controlling, but the Court did not explicitly state that findings of "arbitrary and capricious" action were unnecessary or improper. 112 U.S. App. D.C. at 270, 275 n.16, 302 F.2d at 855, 860 n.16.

**/ See, e.g., Findings of Fact and Conclusions of Law in Bresnahan v. Cameron (Habeas Corpus No. 304-64) (earlier habeas proceeding brought by appellant).

action should be dispensed with. An initial and practical reason for doing so is that none of the decisions of this Court in this area has attempted to set forth what proof is required to demonstrate that the Superintendent's refusal to certify is "arbitrary" and "capricious." As Judge Fahy has pointed out, these terms have been borrowed from another legal context. (Ragsdale v. Overholser, 108 U.S. App. D.C. 308, 315, 281 F.2d 943, 950 (concurring opinion).) As applied to an essentially negative act - the decision not to certify - in an area in which few people ever speak with certainty, they confuse rather than illuminate the central problems at issue. */

Two interpretations could conceivably be given the terms. Each is equally objectionable. One, the traditional sense, describes administrative action taken "without adequate determining principle" or "fixed or arrived at through an exercise of will or caprice." See, e.g., United States v. Carmack, 329 U.S. 230, 243 (1946). The second treats the

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*/ Courts in those few jurisdictions which have statutes requiring certification by an administrative agency prior to release have held either that habeas corpus was altogether unavailable (which would clearly be unconstitutional today) or that, when habeas corpus is sought, a court is to order release on the basis of its own appraisal of the present sanity of the petitioner. Compare State ex rel. Colvin v. Superior Court, 159 Wash. 335, 293 Pac. 986 (1930) (holding habeas altogether unavailable) with People ex rel. Peabody v. Chanler, 133 App. Div. 159, 117 N.Y. Supp. 322 (1906) and Ex Parte Clark, 89 Kan. 539, 129 Pac. 492 (1912) (concurring opinion) (both holding that, despite requirement of certification, release is available through a writ of habeas corpus upon the petitioner's establishing his present sanity). None of these courts have required proof of arbitrary and capricious action.

requirement of proving that a refusal was "arbitrary and cparicious" as merely a shorthand for requiring the petitioner either to bear a very high burden of the proof or to prove his sanity beyond a reasonable doubt. See Robertson v. Cameron, 224 F. Supp. 60, 62 (D.D.C. 1963) Section 24-301 should not be interpreted as requiring proof of arbitrary and capricious action in the literal sense for three separate reasons of constitutional policy, all subsumed under the concept of due process of law. Two of these apply with equal force to an interpretation requiring the petitioner to bear a high burden of proof.

The first applies with greatest particularity only to a requirement that arbitrary and capricious action in the literal sense be proved. A holding that such proof is required necessarily renders of crucial significance the Superintendent's determination whether or not to certify. It necessarily makes judicial review of a very limited nature. Such deference to administrative determinations has, of course, become a familiar phenomenon in our society, */ but not in areas in which individual freedom is at stake and the individual involved has no right to present his case before the administrative body affecting him.

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*/ See, e.g., United States v. Carmack, supra.(selection of site for Post Office reviewable, if at all, only if made arbitrarily and capriciously.)

The Superintendent's refusal to certify -- embodied only in a return to an order to show cause why a writ of habeas corpus should not issue -- is not the product of any sort of hearing. The petitioner has no right to introduce evidence for the Superintendent to evaluate, no right to confront or cross-examine those whose assertions form the basis for the Superintendent's decision, and, indeed, no right to be heard at all. Cf., Pointer v. Texas, 380 U.S. 400 (1965). He thus has no opportunity to create a record before the Superintendent on the basis of which the Superintendent would be arbitrary and capricious in refusing him a certificate for release. The absence of a right to be heard when individual liberty is at stake should thus be sufficient reason in itself for not interpreting § 24-301 as requiring proof that the Superintendent's decision was arbitrary and capricious in the literal sense.*/ (Cf., Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123 (1943)).

The second reason for holding that section 24-301 does not require proof of "arbitrary" and "capricious" conduct

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*/ Of course, this argument does not imply that where persons with demonstrated criminal tendencies are involved, a court should not give considerable weight to the opinions of those in whose custody he has been held, but such weight should be in proportion to its probative worth and not frozen into a rigid and inflexible formula. This Court has frequently said that habeas corpus proceedings in these matters are not strictly adversary proceedings (see Lake v. Cameron, supra at 7 n.10 and cases cited); it is more consistent with such a concept that artificial standards be rejected.

applies with equal force to an interpretation requiring the petitioner to meet a high burden of proof. When the standards for release are viewed in the light of the standards for commitment, it becomes clear that onerous standards for release are incompatible with due process. As discussed in Part I, supra, a person is to be found not guilty by reason of insanity and sent to St. Elizabeths, even if there was only a reasonable doubt as to his sanity at the time of the commission of the offense. No affirmative finding of present insanity is required.

In Ragsdale v. Overholser, 108 U.S. App. D.C. 308, 281 F.2d 943 (1960), this Court held that these low standards for commitment were constitutional under the due process clause, since a person found not guilty by reason of insanity could reasonably be confined "for such period as is required to determine whether he has recovered and whether he will be dangerous if released." 108 U.S. App. D.C. at 314, 281 F.2d at 949. Accordingly, under the Ragsdale reasoning, the mandatory commitment procedure should be held constitutional only so long as release is adequately available after there has been a sufficient period "to determine whether [the defendant] . . . has recovered and whether he will be dangerous if released."

No such adequate release procedure is available so long as the release statute is interpreted to require petitioners to bear an impossibly high burden of proof. As Judge Holtzoff said in the hearing in this case, "I think a finding that a high public official is acting arbitrarily and capriciously

is no light matter" (Tr. 48). Indeed,knowledge in the field of psychiatry has not reached such a level that opinions can be given with the degree of certainty such high standards require. To avoid these inequities a petitioner should be eligible for release upon proof by a preponderance of evidence that he does not continue to suffer from an abnormal mental condition by reason of which he might be dangerous in the reasonably foreseeable future.

The third constitutional consideration -- applicable regardless of the manner in which the terms "arbitrary" and "capricious" are construed -- flows from concepts of equal protection.*/ These concepts are dealt with at length in the first section of this brief and reference is made to that discussion, which considers particularly the effects of the recent important decision of the Supreme Court in Baxstrom v. Herold 383 U.S. 107 (1966). The Court there held that where the issue to be determined is "whether a person is mentally ill at all," no justification exists for according one class of persons less protective standards than are accorded another.

So long as section 24-301 is construed as requiring those found not guilty by reason of insanity to prove arbitrary and capricious action, such less protective standards will

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*/ For Federal purposes, equal protection is one aspect of the broader concept of due process of law under the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954).

exist in the District of Columbia as to release. As stated by the District Judge in the course of the hearing in this proceeding:

> "Where the commitment is civil all I have to determine is whether the patient has recovered his sanity. In a criminal case I have to go farther; I have to find not only that the petitioner has recovered his sanity, but that the Superintendent is acting capriciously and arbitrarily in refusing to find otherwise, which creates a much heavier burden." (Tr. 48)

Even those committed under the special provisions relating to sexual psychopaths - persons with a history of sexual misconduct- are entitled to release on proof of recovery, without demonstrating an arbitrary and capricious refusal of the Superintendent to certify them for release. D.C. Code § 22-3508; see Malone v. Overholser, 93 F. Supp. 647 (D.D.C. 1950).

Thus whether or not this Court ultimately accepts the argument of Part I. that Baxstrom demonstrates the unconstitutionality of the mandatory commitment procedure, the constitutional considerations underlying Baxstrom are at least of sufficient magnitude to warrant this Court's interpreting section 24-301 in such a manner that no proof of arbitrary and capricious action is required to effect release.*/

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*/ That constitutional concepts of equal protection compel this result has also been suggested in Overholser v. Russell, 108 U.S. App. D.C. 400, 404, 283 F.2d 195, 199 (Bazelon, J., concurring): "Hence, constitutional considerations would
(footnote continued on next page)

In sum, under the O'Beirne decision no arbitrary and capricious action on the part of the Superintendent need be shown. The wisdom of O'Beirne is borne out by the three constitutional policies above discussed. The only appropriate question to be asked is whether there is "freedom from such abnormal mental condition as would make the individual dangerous to himself or the community in the reasonable foreseeable future." Overholser v. Leach, supra. In the present case, the District Court did purport to make a separate finding that the petitioner was suffering from an abnormal mental condition which might cause danger to himself or to others (see Findings of Fact and Conclusion of Law and Order), but because of the repeated references of the District Judge to the necessity for finding that the Superintendent was not acting arbitrarily and capriciously (Tr. 6, 29-30, 47-49), it is impossible to tell the degree to which the latter inappropriate consideration affected the Court's determination of the petitioner's sanity. Having answered first the question whether the Superintendent had been arbitrary and capricious

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*/ continued. require that continued confinement of such persons rests on the laws governing the civil commitment of the insane since they prescribe greater safeguards than the more summary proceedings under § 24-301." (See also, Ragsdale v. Overholser, 108 U.S. App. D.C. 308, 281 F.2d 943 (Fahy, J., concurring).)

(Tr. 30, 48), the District Court might understandably have focused with less precision on the more particular question of the appellant's mental condition.

Accordingly, this Court should reverse in order to permit the District Court to make findingsunaffected by the erroneous standard of arbitrariness and capriciousness. Consideration of the appropriate standard should also be made by this Court even if it should be concluded that the lower court's finding as to sanity was not colored by the "arbitrary-and-capricious" standard. Reversal is required in any case because of the erroneous refusal of the District Court to grant the petitioner an independent psychiatric examination, and a new hearing will necessarily follow. At this time the question of the appropriate standard will inevitably be a central issue, unless this Court clarifies the standard to be applied.

IV. The District Court Erred in Refusing to Order Appellant's Release Since, Under the Correct Standards, the Petitioner Met His Burden of Proof

The District Court dismissed appellant's petition on the ground that he had failed to prove that the Superintendent of St. Elizabeths had been arbitrary and capricious in refusing to certify him for release (Tr. 47). In the preceding section of this brief it is demonstrated that proof of an

arbitrary and capricious refusal is not a requisite for obtaining release. Accordingly, since the District Court's further findings of fact were "clearly erroneous," its judgment must be reversed.*/

The determinative erroneous finding of the District Court was that "the evidence shows that petitioner is suffering from a mental disease, i.e., schizophrenic reaction, chronic undifferentiated type and is likely to be dangerous to himself or others if released into the community." (Findings of Fact and Conclusions of Law and Order, p. 1)

As to the petitioner's suffering from a "mental disease," the unchallenged testimony of Dr. Weichardt in this regard was as follows:

> "THE COURT: But what is his present mental illness?
>
> THE WITNESS: He is not psychotic at present, Your Honor.
>
> THE COURT: But is he mentally ill?
>
> THE WITNESS: I would say that since his return to the hospital in December, that his attitude has really been one of anger rather than of mental illness." (Tr. 10)

Testimony to the effect that the appellant has some "residuals" of schizophrenia (Tr. 9) must be seen in

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*/ Federal Rule of Civil Procedure 52(a); Overholser v. Russell, 108 U.S. App. D.C. 400, 403, 283 F.2d 195, 198 (reversing District Court for findings of fact that were "clearly erroneous").

light of the fact that the schizophrenia is now, and has for some time, been "in a state of remission" (Tr. 24). As Dr. Weichardt testified on cross-examination:

> "Q. At the present time you testified that the patient is quarrelsome and not cooperative, is that correct?
>
> A. That is correct.
>
> Q. But that he does not now, nor has for some time, evidenced any indications of the psychotic or schizophrenic behavior for which he was committed in 1962, isn't that a fact?
>
> A. That is correct." (Tr. 26).

The remaining part of the District Court's finding -- that, because of his illness, the petitioner was likely to be dangerous to himself or others if released into the community -- is similarly erroneous. As the District Judge realized, he was required to find not merely a likelihood of dangerousness, but, beyond this, a likelihood of dangerousness arising out of a mental illness or abnormal mental condition. Starr v. United States, 105 U.S. App. D.C. 91, 96, 264 F.2d 337, 382 (1958). There was no evidence to justify such a finding in this case. If, as the evidence above indicates, appellant is not presently suffering from an abnormal mental condition there is, of course, no condition from which a likelihood of injury could flow. Even if he has some residuals of illness, the only evidence as to possible future dangerousness was made by Dr. Weichardt on

the basis of an assessment of probabilities based on the fact of a prior history of difficulties with the police (Tr. 17).

Finally, even if, contrary to the arguments in Part III, supra, this Court should determine that the petitioner was required to prove that the Superintendent's refusal to certify was arbitrary and capricious, it should, nevertheless, reverse the District Court's finding in this regard as "clearly erroneous." The uncontested testimony of the representative from St. Elizabeths as summarized above so completely demonstrates the petitioner's eligibility for release that it was arbitrary and capricious of the Superintendent not to so certify.

Accordingly, the District Court's judgment should be reversed and remanded with instructions to grant the writ and order petitioner's immediate release.

CONCLUSION

In conclusion, for the reasons stated in Part IV, of this brief, the Court should reverse the judgment of the District Court and remand with instructions that the writ be issued and the petitioner released.

If the Court rejects the arguments made in Part IV, it should, for the reasons stated in Part I, remand to the District Court with directions to hold a new hearing under the standards set forth in Part I. Alternatively, for the same reasons stated in Part I, this Court should remand with orders to release the petitioner unless within a short time appropriate civil commitment proceedings are initiated.

Finally, if the Court rejects the arguments of Part I, then it should remand for a new hearing for the reasons set forth in Parts II and III.

Respectfully submitted,

/s/ David L. Chambers, III.
David L. Chambers, III.

Attorney for appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was mailed first class postage prepaid to Frank Q. Nebeker, Assistant United States Attorney, Chief, Appellate Division, United States Court House, Washington, D.C. 20001, this eighth day of September, 1966.

/s/ David L. Chambers, III

David L. Chambers, III

REPLY BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,162

RONALD W. BRESNAHAN, Appellant

v.

DALE C. CAMERON, Appellee

Appeal from a Judgment of the United States District Court
for the
District of Columbia

David L. Chambers, III
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Washington, D.C. 20006

Attorney for Appellant
(Appointed by this Court)

INDEX

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

REPLY BRIEF FOR APPELLANT

The arguments advanced in Parts III and IV of the appellee's brief filed herein on October 7, 1966, have been largely anticipated and met in appellant's brief filed on September 8, 1966. Appellant particularly disagrees with appellee's assertions in Part III concerning standards for release, but believes that he can deal adequately with these assertions in oral argument to the extent that they are not covered in his original brief.

Part I of appellee's brief (pp. 11-14), which deals with the appellant's claim that the mandatory commitment provisions of 24 D.C. Code, § 301(d) are unconstitutional as a denial of equal protection of the laws, does, however, require additional comment at this time. The government has argued that appellant, having voluntarily pleaded not guilty by reason of insanity, cannot now complain of the commitment which followed the trial. Appellant believes this argument unsound and wishes to deal with it in order that time need not be unduly devoted to it at oral argument.

Similarly, Part II of appellee's brief (pp. 14-16), which considers appellant's right to an independent mental examination upon request, also requires additional comment in that the government has made certain misstatements concerning the holding and the implications of the important

decision of this Court in Watson v. Cameron, 114 U.S. App. D.C. 151, 312 F.2d 878 (1962), the only case in which this Court has dealt with the right to a mental examination when requested by a person found not guilty by reason of insanity.

I. The Petitioner Is Being Illegally Held Because the Mandatory Commitment Provisions of D.C. Code Section 24-301(d) Denied Him Equal Protection of the Laws

In its brief, the government argues that the appellant -- having elected at his trial to make himself a member of the class of persons "affirmatively and successfully seeking to avoid criminal responsibility by assertion of the insanity defense" -- cannot "now be heard to complain" of the consequences of his election, that is, his mandatory commitment to St. Elizabeths under 24 D.C. Code section 301(d). (Govt. Br. p. 12). This threshold argument to prevent the Court from dealing with the merits of appellant's constitutional argument must be rejected.

This argument of the government seems to be premised on two equally unacceptable propositions. First, the government appears to be relying on the argument that he who makes himself a member of a class receiving a benefit from the state cannot complain if the receipt of that benefit is conditioned upon the surrender of some constitutional right. Such an argument has met with limited favor in the courts[1/] and

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1/ See, e.g., Terral v. Burke Construction Co., 257 U.S. 529 (1922) (Invalidating a state statute conditioning the privilege of transacting interstate business on an agreement by the foreign corporation not to use the federal courts.)

considerable criticism from critics,[2] but, whatever acceptance it has received has been only in cases in which the benefit was one which the state might, if it chose, have refrained altogether from extending.[3] The limited application of this doctrine is attributable to the inherent limitations in the argument supporting it: the government cannot force persons to surrender their constitutional rights, but since it can refuse to grant certain benefits altogether, it can, it is argued, condition the receipt of these benefits on the voluntary surrender of constitutional rights.

But the state is not extending to a criminal defendant a benefit which it might otherwise refuse to extend by permitting him "to avoid criminal responsibility" (Govt. Br. p. 12) through pleading not guilty by reason of insanity. It is now clear that just as a defendant has a right to plead not guilty at all, he has a right, grounded in fundamental constitutional precepts, to plead not guilty by reason of insanity; stated slightly differently, he has a right not

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2/ See, e.g., French, Unconstitutional Conditions: An Analysis, 50 Geo. L. J. 234 (1961); Powell, T. R., The Right To Work For the State, 16 Colum. L. Rev. 99 (1916).

3/ See, e.g., American Communications Ass'n. v. Douds, 339 U.S. 382 (1950); Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595, 1595-96 (1960).

to be punished criminally if he was not responsible in a legal sense for the act he committed.[4] Thus, since the government could not take away the right to plead not guilty by reason of insanity, the government's argument that the defendant who voluntarily exercises the right cannot complain of a violation of his right to equal protection of the laws is obviously unacceptable: it can hardly be argued that the government can condition the exercise of one constitutional right on an agreement to give up another.[5]

The second proposition seeming to underlie the

4/ Neither this Court nor the Supreme Court has apparently had to face the pure question whether a defendant can be altogether denied the defense of not guilty by reason of insanity, presumably because no jurisdiction has entirely denied the defense. This Court has, however, stated:

> "The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called mens rea), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there will not be criminal responsibility." (Durham v. United States, 94 U.S. App. D.C. 228, 242, 214 F.2d 862, 876 (1954); see also Whalem v. United States, 120 U.S. App. D.C. 331, 337, 346 F.2d 812 816 (1965) (en banc).)

5/ See Smith v. Bennett, 365 U.S. 708 (1961) (State required all persons, including indigents, to pay a fee for filing applications for writs of habeas corpus; a unanimous Supreme Court found this a denial of equal protection of the laws and, on the ground that habeas corpus was a fundamental constitutional right, rejected an argument by the State that habeas corpus was a statutory benefit of a civil nature which could be conditioned in any manner the State saw fit.)

government's argument -- especially insofar as it asserts that the appellant cannot "now" challenge the constitutionality of his commitment -- is that there has been a waiver of his constitutional right -- that is, that any complaint as to the constitutionality of his commitment has been waived by not having been raised at his original trial, and cannot now be raised through habeas corpus. This contention is unsound for the following reasons:

(1) The trial of a criminal defendant is concerned with the issues of guilt and criminal responsibility, not with all of the ramifications flowing from a finding of guilt or responsibility. That this is so is justified both by tradition and by considerations of the effecient administration of justice. Habeas corpus has, however, always been available for testing the legality of a confinement[6/] and it is the legality of the very confinement procedure that is being challenged here.

(2) Since the appellant had a fundamental right to plead not guilty by reason of insanity and since the prosecutor could not have taken this right away from him (Durham v. United States, supra), the government is in no way prejudiced by defendant's not having raised the issue at trial.

A final point demonstrating the unacceptability of the government's argument, however it is interpreted, is that this Court in Ragsdale v. Overholser, 108 U.S. App. D.C. 308,

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6/ See Fay v. Noia, 372 U.S. 391, 399-414 (tracing history of the writ of habeas corpus).

281 F.2d 943 (1960) dealt with the merits of the constitutionality of the very statute with which we are concerned here in a habeas corpus proceeding brought by a person who had pled not guilty by reason of insanity. The Court did not avoid dealing with the merits by holding, as the government would have the Court do here, that the issue had been raised too late or that it could not be raised because the plea of not guilty by reason of insanity had been made voluntarily.7/

The case of Curry v. Overholser, 109 U.S. App. D.C. 283, 287 F.2d 137 (1960), relied on by the government, is distinguishable in a significant respect. That decision, which rejected an argument challenging the unconstitutionality of the mandatory commitment statute in part on the grounds called for by the government, involved an abuse by the criminal defendant of his right to plead not guilty by reason of insanity: the appellant there admitted in the course of his habeas corpus hearing that prior to his original trial "he had told a series of falsehoods to the psychiatrists [at St. Elizabeths], concerning alleged headaches and

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7/ The Ragsdale case dealt with the fairness of the mandatory commitment procedure considered in and of itself and did not in any way deal with the equal protection problems raised here. Indeed, the Ragsdale case was decided in 1960 prior to major amendments in the procedures relating to civil commitment. These amendments greatly increased the disparity existing between that class of persons and those found not guilty by reason of insanity.

hallucinations, in an effort to 'bug out,' i.e., establish his insanity defense." 109 U.S. App. D.C. at 285, 287 F.2d at 139. As in the Ragsdale case, supra, no such abuse of the right did exist or is claimed to have existed in the case at bar, and thus, this Court, as in Ragsdale, should deal with the merits of the constitutional argument.

II. The District Court Improperly Refused Appellant's Request For An Independent Mental Examination

In response to appellant's argument that the District Court committed reversible error in refusing to grant an independent mental examination, the government asserts that appellant "had failed to satisfy the conditions laid down in Watson v. Cameron, 114 U.S. App. D.C. 151, 312 F.2d 878 (1962). and is therefore not entitled to claim such an examination as a matter of right." (Appellee's Br. 14).

This assertion of the government's contains two significant errors. First, as is fully discussed in appellant's brief (pp. 22-29) and thus will not be repeated here, appellant did meet the condition laid down in Watson in that over one year (seventeen months) had elapsed since his only previous independent examination. Second, even if this Court should find that the Watson case does not provide a final answer to the situation presented here (since appellant here had had one previous examination), it does not follow that the petitioner is "therefore not entitled to claim" an examination as a matter of right. Judge Burger, in his opinion in Watson for a unanimous court, indicated that the decision should not be read as holding that only those who fall within its facts are entitled to examinations; indeed, he expressly refused to exclude the possibility that outside experts would be held available

as a matter of right in all cases upon request.[7]

The Watson case was simply the first decision of this Court dealing with the standards to be applied when persons found not guilty by reason of insanity request independent mental examinations under 21 D.C. Code §§ 502, 503 (Supp. V, 1966), and should be seen -- as the Court intended it -- as the beginning rather than the end of this Court's efforts to mark the metes and bounds of the area within which independent examinations are a matter of right. Accordingly, appellant's brief did not contend that there were no differences between the facts in the Watson case and those in this case.[8] It was not denied that the appellant here, unlike the petitioner in Watson, had been granted one independent mental examination in the past. What appellant did contend was that the factual distinction between Watson and this case cannot justify different results in the two cases.

The appellee, on the contrary, claims that the fact

7/ "We do not decide whether appointment of an outside expert is required in every case on demand . . . ." 114 U.S. App. D.C. at 152-53, 312 F.2d at 879-80(1962).

8/ Appellant's Br. 23-24.

that the petitioner in Watson was requesting his first independent examination was the crucial element in that case and that the Court in Watson decided that only when there has never been an examination must one be granted as a matter of right. Although the initial independent examination is undoubtedly important, successive ones at reasonable intervals should be seen as even more so: the longer a person has been held in St. Elizabeths with the Superintendent refusing to certify him for release, the greater the necessity becomes to test and retest the judgments of those who are incarcerating him.

In this very case, for example, the unchallenged testimony of the staff of St. Elizabeths was that the appellant had been confined in St. Elizabeths for four years and that no incidents suggesting a flare-up of his schizophrenia had occurred in the entire seventeen months since his preceding independent examination.[9/] Despite this, no release had been recommended. Though these facts alone should have caused a court to question the propriety of further retention, truly effective demonstration of impropriety could only be accomplished through psychiatric testimony in appellant's behalf. For an indigent, such testimony is possible only by

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9/ Tr. 10, 24-25; Return to Order to Show Cause Why the Writ of Habeas Corpus Should Not Issue (Dr. Cameron), p.2.

providing him an opportunity for an independent mental examination.[10] D.C. Code sections 21-502 and 21-503 (Supp. V, 1966) unquestionably permit such opportunities to be granted.

Accordingly, this Court should reverse the decision of the lower court on one of the following grounds: (a) that examinations are to be granted on request in all cases; (b) that examinations are to be granted on request when no examination has been accorded in over one year; or (c) that, on the facts of this case, considering the defendant's uncontestedly improved condition and the length of time since his prior examination, it was an abuse of discretion for the District Court not to have granted the defendant's request.

10/ See DeMarcos v. Overholser, 78 U.S. App. D.C. 131, 132, 137 F.2d 698, 699 (1943).

CONCLUSION

For the reasons stated in Appellant's Brief and in this Reply Brief, the Court should reverse the decision of the district court, disposing of the case in the manner called for in the conclusion to Appellant's Brief (p. 46).

Respectfully submitted,

/s/ David L. Chambers, III
David L. Chambers, III.

Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief was mailed first class postage prepaid to David G. Bress, Esq., United States Attorney in and for the District of Columbia, United States Court House, Washington, D.C.

/s/ David L. Chambers, III
David L. Chambers, III

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,162

RONALD W. BRESNAHAN, APPELLANT

v.

DALE C. CAMERON, Superintendent, Saint Elizabeths Hospital, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM M. COHEN,
SCOTT R. SCHOENFELD,
Assistant United States Attorneys.

H.C. No. 165-66

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Does the mandatory commitment provision unreasonably discriminate between persons seeking acquittal by reason of insanity and persons civilly committed?

2) Did the district court abuse its discretion in denying appellant an independent mental examination where he had received one only a year and a half before, and there was ample medical evidence to justify the court's findings?

3) Did the district court improperly apply the standard of proof as to sanity and lack of dangerous propensity therefrom in concluding as a matter of law that appellant had not shown "arbitrary and capricious" refusal of certification by the superintendent?

4) Are the district court's findings and conclusions adequately supported by evidence where the only medical testimony is to the effect that appellant is presently suffering from a mental illness in remission and there is a probability of his "getting into trouble" as before if released?

INDEX

TABLE OF CASES

Cases—Continued

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,162

RONALD W. BRESNAHAN, APPELLANT

v.

DALE C. CAMERON, Superintendent, Saint Elizabeths Hospital, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant, Ronald W. Bresnahan (Robert W. Bresnahan), was committed to Saint Elizabeths Hospital pursuant to 24 D.C. Code § 301(d) on July 10, 1962, having been found not guilty by reason of insanity of robbery (two counts), assault with intent to commit robbery, carrying a dangerous weapon (three counts), and assault on a police officer with a dangerous weapon in Criminal Case Numbers 120-62 and 121-62 (22 D.C. Code §§ 2901, 501, 3204, and 505(b). He filed three petitions for writ of habeas corpus on which hearings were held in the United

States District Court on June 17, 1963, December 14, 1964, and April 18, 1966. Following each hearing the writ was discharged, the petition dismissed, and appellant was remanded to the custody of the superintendent of the hospital. From the last dated hearing this appeal followed.

Background

Appellant was indicted in seven counts for offenses occuring in three separate incidents on January 7 and 9, 1962. Thereafter on March 9, 1962, on his own motion he was committed to Saint Elizabeths Hospital for a period not to exceed ninety days for psychiatric examination. In his motion filed February 21, 1962, and in the supplemental affidavit thereto filed March 6, 1962, appellant represented to the court that: (1) as a result of an automobile accident at an early age, he might have sustained organic brain damage; (2) for the past several years, he had been suffering from splitting headaches; (3) there was a history of insanity on both sides of his family, namely, his father, brother, sister, and his mother's brother had all been institutionalized or under psychiatric care, and his father's sister committed suicide; (4) he had committed two auto thefts in New York at age sixteen, as a result of which, combined with parole and probation violations, he spent nearly six years in penal institutions; (5) while in reform school he was under psychiatric care for two years from 1951 to 1953; (6) while in jail in Syracuse, N.Y., in 1956, he cut both forearms with a piece of glass in a suicide attempt, requiring over 100 sutures; (7) as a result of that episode, he was committed to the Syracuse Psychopathic Hospital in February 1956; (8) since his parole from custody in New York two years before, he had wandered from one end of the country to the other, drinking frequently and in large quantities, because he was depressed and lacked self-confidence, and because he was afraid to stay in one place for more than a couple of weeks; (9) he had impressed trial counsel with his intense anti-social attitude, manifested largely by a fear

and hatred of people in general and police operatives in particular. By letter filed June 1, 1962 the Acting Superintendent of Saint Elizabeths reported to the court that in the opinion of the hospital staff appellant was competent to stand trial; that he was suffering from a mental illness, schizophrenic reaction, chronic undifferentiated type at the time both of the examination and of the alleged offenses; and that the staff was unable to express a valid opinion concerning whether the alleged criminal offenses were products of his mental illness. On June 10, 1962, appellant waived his right to jury trial, was found not guilty by reason of insanity by the court, and was ordered confined in Saint Elizabeths Hospital under 24 D.C. Code § 301(d). Judge McGarraghy presided.

Thereafter, appellant filed a petition for a writ of habeas corpus which was heard and discharged by Judge Youngdahl on June 17, 1963, Habeas Corpus No. 224-63. No appeal was taken. Appellant again filed a petition for habeas corpus on August 5, 1964, Habeas Corpus No. 304-64. On motion of his counsel, an independent psychiatric examination was ordered performed by the Legal Psychiatric Services staff. In a letter to the court filed November 2, 1964, Dr. Donald Goldberg, Staff Psychiatrist, Legal Psychiatric Services, stated as follows:

> "In accordance with Your Honor's request . . . I conducted a psychiatric examination of Ronald W. Bresnahan at St. Elizabeth's Hospital on Oct. 29, 1964. I also had the opportunity to inspect the hospital records.
>
> "As a result of that examination, it is my opinion that the said Ronald W. Bresnahan continues to suffer from a mental disorder, e.i., Schizophrenic reaction, chronic undifferentiated type.
>
> "It is my feeling that the possibility exists that [he] may still be dangerous to himself or others if released into the community at this time."

The case was heard and the writ discharged by Judge Robinson on December 14, 1964, and findings were made

including, *inter alia*, that appellant still suffered from his abnormal mental condition and would be dangerous to himself or others if released. No appeal was taken.

The hearing on April 18, 1966

On March 31, 1966 appellant, *pro se*, filed in the District Court a third petition for writ of habeas corpus, seeking his unconditional release from the hospital, Habeas Corpus No. 165-66. In his petition appellant alleged that he was entitled to his release and that Dr. Cameron was acting arbitrarily and capriciously in depriving him of his freedom. He also indicated that he thought an independent mental examination might aid his cause. The court ordered appellee to show cause why the writ should not issue.

In his return and answer to the rule to show cause, appellee admitted that appellant was detained but denied that the detention was illegal. Dr. Cameron also denied that he was acting arbitrarily and capriciously. He pointed out that appellant had twice before sought release on habeas corpus, but that on each occasion the writ had been discharged, the petition dismissed, and appellant remanded to the hospital for further care and treatment. He informed the court that on July 10, 1964, appellant had been found in possession of improvised tools used to chop a hole through the wall of his room to the outside, and of six sheets which could have been used to climb down on. Finally, Dr. Cameron noted that:

> "During the petitioner's period of confinement in Saint Elizabeths Hospital, he has been under the care and observation of members of the medical staff of Saint Elizabeths Hospital, skilled in the care, diagnosis and treatment of nervous and mental disorders, who are of the opinion that he has not recovered from his abnormal mental condition, Schizophrenic Reaction, Chronic Undifferentiated Type; and, respondent is unable to certify that the petitioner will not be dangerous to himself or others within the reasonable future by reason of mental disorder."

On April 18, 1966, the case came on for hearing before Judge Holtzoff, appellant being represented by appointed counsel, Nelson Deckelbaum. Appellant's attorney early in the course of the hearing requested alternative relief in the form of an examination by the Mental Health Commission if the judge should determine at the close of the hearing not to grant the writ (Tr. 6-7).

Appellee presented as its sole witness Dr. George Weickhardt, a psychiatrist supervising the John Howard Pavilion at St. Elizabeths Hospital (Tr. 8-9). Dr. Weickhardt testified that he had known appellant since July 1965 and was familiar with his hospital records and prior psychiatric history including an attempted suicide (Tr. 9, 17-19). In regard to appellant's present mental illness, the doctor opined that he was not presently psychotic, that his psychosis was in remission as it had been since appellant's admission to the hospital following his acquittal in 1962 (Tr. 9, 24). He noted, however, that appellant had some residual mental illness as well as residual brain damage as a result of stroke (Tr. 9, 11). These residuals manifested themselves in a decided quarrelsomeness and uncooperativeness in regard to the hospital educational and treatment programs (Tr. 10, 12). Moreover, although appellant's tenseness, confusion, memory difficulties, and borderline delusional hostilities toward police officers had subsided, the doctor noted that there had been some flare-ups. These flare-ups he described as threats of bodily harm against a nurse and an assault and biting of a patient in 1963, and an unsuccessful attempt to batter an escape hole through a wall of his room in 1964. (Tr. 24-25.) While the doctor did not consider that these flare-ups pushed appellant back into his chronic psychosis, he indicated they were sudden in nature and could occur if appellant were given his liberty (Tr. 25). The doctor also noted that appellant had escaped from the hospital in November, 1965, a few weeks after his transfer out of a maximum security ward (Tr. 12, 23, 27-29). As to his opinion of appellant's dangerousness if released, the doctor noted that appellant would not necessarily be dangerous.

But he indicated that in view of appellant's history there was a probability of his getting into similar trouble again, and he could not see that appellant had changed a good deal since the time he was getting in trouble and was diagnosed as schizophrenic reaction (Tr. 17). The doctor recommended further treatment of and more participation in hospital programs by appellant (Tr. 27).

Appellant presented his case through his own testimony alone. He claimed he had never refused any therapy at Saint Elizabeths, but later qualified this by saying his physical condition prevented his participation in programs on his return to the hospital in 1965 (Tr. 32, 40). He gave it as his opinion that he was neither insane nor dangerous, but acknowledged his earlier delusional ideas and psychiatric history (Tr. 33, 41-42, 43-45). He sought to explain his 1965 escape from Saint Elizabeths (Tr. 34-36).

At the close of the testimony, the judge discharged the writ and dismissed the petition. The judge noted that:

> "I find no basis for concluding that the Superintendent of St. Elizabeths Hospital is acting arbitrarily or capriciously in refusing to certify the Petitioner for release. I have in mind the dangerous nature of the crimes involved in this case committed at gunpoint; the fact that this Petitioner was diagnosed as having one of the severe forms of psychosis, schizophrenic reaction, it was not one of those borderline mental diseases concerning which psychiatrists differ.
>
> "True, he is now and has been for some time in a period of remission, but during the period of remission he has had a couple of flare-ups.
>
> "The Superintendent of St. Elizabeths Hospital is not willing to say that he would not be dangerous to himself or others if released.
>
> "He has had flare-ups even under the regimented conditions of John Howard Pavilion.
>
> "I think it would be improvident for this Court to overrule the Superintendent under those circum-

> stances, because of the way this Petitioner has used firearms in his former activities." (Tr. 47.)

When defense counsel renewed his earlier request for an alternative independent mental examination after discharge of the writ, the court declined to grant it, noting that this was not a borderline or doubtful case. Here, said the court, appellant had a heavier burden than in civil habeas corpus proceedings of showing an arbitrary and capricious refusal by the Superintendent to certify, and this was no light matter where the question was whether a particular person might be a menace to society. (Tr. 48-49.)

On April 19, 1966 the court entered findings of fact and conclusions of law. The court found *inter alia*:

> "3. The evidence shows that petitioner is suffering from a mental disease, *i.e.*, schizophrenic reaction, chronic undifferentiated type and is likely to be dangerous to himself or others if released into the community.
>
> "4. The superintendent of St. Elizabeths Hospital has not certified to the Court that petitioner is eligible for release in accordance with the provisions of 24 D.C. Code Section 301(e)."

The court went on to conclude as a matter of law that:

> "1. Petitioner has failed to sustain his burden of proving his eligibility for release under the statute.
>
> "2. Petitioner has not shown that the failure of the superintendent to certify him for release is arbitrary or capricious.
>
> "3. Petitioner is legally detained in the custody of respondent."

STATUTES INVOLVED

Title 22, District of Columbia Code, § 501, provides in pertinent part:

> Every person convicted of any assault with intent . . . to commit robbery . . . shall be sentenced to imprisonment for not more than fifteen years.

Title 22, District of Columbia Code, § 505, provides:

> (a) Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than five years or both.
>
> (b) Whoever in the commission of any such acts uses a deadly or dangerous weapon shall be imprisoned not more than ten years.

Title 22, District of Columbia Code, § 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Title 22, District of Columbia Code, § 3204, provides in pertinent part:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed.

Title 24, District of Columbia Code, § 301, provides in pertinent part:

> (d) If any person tried upon an indictment or information for an offense . . . is acquitted solely on the ground that he was insane at the time of its

commission, the court shall order such person to be confined in a hospital for the mentally ill.

(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. . . .

(g) Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus.

SUMMARY OF ARGUMENT

I

The mandatory commitment provision of 24 D.C. Code § 301(d) as here applied does not violate appellant's right to equal protection of the laws. Neither absence of a hearing nor distinction in treatment between persons in the position of appellant and civilly committed persons is unreasonable, as shown by the case law. The *Baxstrom* decision exclusively relied upon by appellant is inapposite.

II

Having failed to satisfy the conditions in the *Watson* case regarding (1) absence of a previous independent mental examination and (2) confinement for a substantial period, appellant is not entitled to such an examination as a matter of right. At best, appellant can claim such an examination in the discretion of the district court. There was no abuse of that discretion where there was ample medical evidence to support the court's findings and conclusions.

III

The district court in finding appellant had failed to show eligibility for release applied proper standards. The established requirements of proof of sanity and lack of dangerous propensity therefrom are heavy upon appellant. In order to insure that reasonable doubts are resolved in favor of public and private safety, appellant must carry his burden to the point of showing "arbitrary and capricious" refusal of certification by the superintendent.

IV

The medical evidence that appellant though in remission was suffering from schizophrenic reaction, chronic undifferentiated type, and that he probably would be "getting

into trouble" if released, supported the district court's findings and conclusions.

ARGUMENT

I. The mandatory commitment provision of 24 D.C. Code § 301(d) as here applied is not constitutionally defective.

Relying exclusively on the recent decision of the Supreme Court in *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), appellant asks this Court to overturn the mandatory commitment provision of 24 D.C. Code § 301(d) on constitutional grounds as violative of appellant's right to equal protection of the laws.[1] This statute was subjected to searching constitutional attack in the early years of its history. Appellant now presses the same attack, thoroughly discredited by a series of major decisions of this Court as well as by implication in the Supreme Court,[2] wrapped in a new cloak of equal protection, tied with the thin string of *Baxstrom*. In *Baxstrom* he finds language on the basis of which he would have this Court hold that the Supreme Court has now *sub silentio* overruled the case precedents, undercut the statutory patterns of numerous jurisdictions as well as the District of Columbia, and rejected the common law history of commitment of the

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[1] Appellant's Br. 12-21.

[2] *Lynch* v. *Overholser*, 369 U.S. 705 (1962). This decision, in sharply distinguishing the situation of a criminal defendant asserting the defense of insanity from that of one on whom it is imposed, gives substantial support to the Government's present contention.

> "[W]e conclude that to construe § 24-301(d) as applying only to criminal defendants who have interposed a defense of insanity is more consistent with the general pattern of laws . . . in the District of Columbia, and with the congressional policy. . . . That construction finds further support in the rule that a statute should be interpreted, if fairly possible, in such a way as to free it from not insubstantial constitutional doubts." At 710-711.

criminally insane.[3] The Government urges that *Baxstrom* cannot be made to carry the burden thus assigned to it by this appellant.

Specifically, appellant claims the statute is unconstitutional because it provided for mandatory commitment after he was found not guilty by reason of insanity, thus failing to provide him with a hearing on present insanity and discriminating between him and a civilly committed person. Of course, by his trial action appellant elected to make himself a member of the "exceptional class" of persons affirmatively and successfully seeking to avoid criminal responsibility by assertion of the insanity defense, and he "cannot now be heard to complain of the statutory consequences of his election." *Curry* v. *Overholser*, 109 U.S. App. D.C. 283, 285-286, 287 F.2d 137, 139-140 (1960). See also, *Overholser* v. *Leach*, 103 U.S. App. D.C. 289, 291-292, 257 F.2d 667, 669-670 (1958), *cert. denied*, 359 U.S. 1013 (1959). The general question of the constitutionality of 24 D.C. Code § 301 is settled in this jurisdiction and has been favorably decided to the validity of the statute. *Foller* v. *Overholser*, 110 U.S. App. D.C. 239, 292 F.2d 732 (1961); *Curry* v. *Overholser*, *supra*; *O'Beirne* v. *Overholser*, 109 U.S. App. D.C. 279, 287 F.2d 133 (1960); *Overholser* v. *Russell*, 108 U.S. App. D.C. 308, 283 F.2d 195 (1960); *Ragsdale* v. *Overholser*, 108 U.S. App. D.C. 308, 281 F.2d 943 (1960). And see *Orencia* v. *Overholser*, 82 U.S. App. D.C. 285, 163 F.2d 763 (1947), which preceded the statutory amendment attacked by appellant. Consistent majorities of this Court have in those decisions indicated their satisfaction with the constitutionality of a mandatory commitment procedure without a "hearing, trial, or affirmative judicial finding that there is a present mental disease or present danger as a basis for confining [appellant]." *E.g.*, *Ragsdale* v. *Overholser*, *supra*, at 312-313, 281 F.2d at 947-

[3] See *Lynch* v. *Overholser*, *supra* at 724-728 (dissenting opinion of Clark, J.).

948. This Court has also consistently indicated satisfaction with the distinctions made between the "exceptional class" of persons obtaining verdicts such as this appellant, and those with "similar mental conditions" who have not done so. *E.g.*, *Overholser* v. *Leach*, *supra*, at 291-292, 257 F.2d at 669-670. "The constitutional attack must be resolved on whether there is a rational connection between the known evidence as to appellant's mental disease and the statute's mandatory commitment provision. We think that connection is present and that it is rational." *Ragsdale* v. *Overholser*, *supra*, at 313, 281 F.2d at 948.

The essential defect in appellant's argument is his total disregard of the factual difference between the situation to which the Supreme Court was speaking in *Baxstrom* and the present case. Baxstrom, about to complete his prison term, was in the position of a person being civilly committed, and his was basically a civil commitment of a person who incidentally had a criminal record. Thus, the Supreme Court failed to find a rational basis for distinguishing his case "from all other civil commitments," and required that he receive the procedural protections prescribed for civil commitments.[4] 382 U.S. at 111. In the present instance, however, appellant is in no sense in the position of a person civilly committed. Rather, he was conclusively presumed insane at the time of committing certain criminal offenses,[5] and was found to have committed but not to have been responsible for his crimes.[6] Clearly, this adjudication takes the present appellant out of *Baxstrom* and brings him within the rational scheme elucidated in *Ragsdale*.

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[4] In the District of Columbia, there has long been recognition that such protections must be afforded persons like Baxstrom. See *Carter* v. *United States*, 108 U.S. App. D.C. 405, 408, 283 F.2d 200, 203 (1960). Of course, the necessary statutory machinery exists.

[5] See, *e.g.*, *Overholser* v. *O'Beirne*, 112 U.S. App. D.C. 267, 275, 302 F.2d 852, 859 (1961), quoting *Taylor* v. *United States*, 95 U.S. App. D.C. 373, 379, 222 F.2d 398, 404 (1955).

[6] See, *e.g.*, *Ragsdale* v. *Overholser*, *supra*, at 313, 281 F.2d at 948.

To the extent that appellant's attack upon the mandatory commitment provision is in fact a disagreement with the policy it expresses, it is suggested that he is knocking at the wrong door. We would urge that Congress is both better equipped and better able to relieve those in the position of appellant from uncomfortable dilemmas in deciding upon their defense against criminal charges brought against them. Policy disagreements ought not to be elevated into constitutional infirmities.

II. The district court did not abuse its discretion in refusing to order an independent mental examination.

Appellant claims reversible error in the refusal of the district court to grant an independent psychiatric examination.[7] However, appellant failed to satisfy the conditions laid down in *Watson* v. *Cameron*, 114 U.S. App. D.C. 151, 312 F.2d 878 (1962), and is therefore not entitled to claim such an examination as a matter of right. Absent those conditions, ordering of such an examination is a matter within the discretion of the court, and appellant is not able to show an abuse of discretion under the circumstances of this case.

This Court in *Watson* set out the conditions entitling appellant to an independent examination as a matter of right in the following words:

> "[A]n independent examination by an expert appointed by the District Court shall be granted as a matter of right (a) where no such examination has previously been granted, and (b) where the movant has been confined in the hospital for a substantial period such as here where the confinement has been more than one year." 114 U.S. App. D.C. at 152, 312 F.2d at 879.

These two conditions are, of course, stated in the conjunctive, and the clear meaning of the Court is that they

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[7] Appellant's Br. 22-29.

shall both be met.[8] In so determining the necessary conditions. the Court undoubtedly bore in mind the importance of a first independent examination in a context in which no postcommitment adjudication of mental condition had taken place.[9] In appellant's case, however, there have been two prior adjudications of abnormal mental condition by reason of which the court was unable to say appellant would not be dangerous to himself or others if released.[10] And of considerable significance is the fact that, in the more recent of these, appellant received an independent mental examination the results of which were tendered to the court and supported its findings.[11]

Aside from the narrow limits of *Watson*, the ordering of an independent examination remains in the discretion of the court, which has not abused it here. The language of *Curry* v. *Overholser*, *supra* at 286, 287 F.2d at 140, while broad, is not to the contrary. And we would point out that the holding of that case is that such examination was not justified under its circumstances. Moreover, *Curry* relies directly upon *DeMarcos* v. *Overholser*, 78

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[8] Appellant's assertion to the contrary at 23-24 of his Brief misconstrues the language in *Watson* "confined for more than one year without such an examination." 114 U.S. App. D.C. at 153, 321 F.2d at 880. While out of context this language would appear to refer to any yearly period during which no examination is made, the facts of that case involved a person held over a year since commitment who had not had an independent examination at any time after commitment. Thus, it is apparent that the unfortunate ambiguity of that language is due to compression of two ideas into a single sentence rather than an intent to limit the detailed prior statement or to reach out for dictum.

[9] In analyzing the empirical validity of the presumption of continuing insanity arising from an acquittal based upon reasonable doubt of sanity, we submit that the inquiry as to whether the original presumption has been reinforced by a postcommitment adjudication of abnormal mental condition based in part on an independent mental examination is a more pertinent inquiry than appellant's simple calculation of time lapse. Compare Appellant's Br. 24.

[10] Habeas Corpus Numbers 224-63 and 304-64.

[11] See Counterstatement, 3-4.

U.S. App. D.C. 131, 137 F.2d 698 (1943), *cert. denied*, 320 U.S. 985 and *Overholser* v. *DeMarcos*, 80 U.S. App. D.C. 91, 149 F.2d 23 (1945), *cert. denied*, 325 U.S. 889. Those cases have been expressly interpreted to make such examination discretionary. *Overholser* v. *Boddie*, 87 U.S. App. D.C. 186, 184 F.2d 240 (1950); *Appel* v. *Overholser*, 82 U.S. App. D.C. 379, 164 F.2d 511 (1947). Despite appellant's arguments to the contrary, the record here indicates, as the district court found, that there was ample medical evidence, fortified by admissions of appellant himself, to justify the court's findings of fact and conclusions of law.[12] Any doubt of the validity of Dr. Weickhardt's conclusions is not, under the circumstances, sufficient to justify this Court in setting aside the district court's findings. See *Curry* v. *Overholser*, *supra*.

III. The district court applied proper standards for determining appellant's eligibility for release.

Appellant's attack on the district judge's use of the term "arbitrary and capricious" in declining to grant the writ is in reality an attack upon the basic standard of proof governing releases under 24 D.C. Code § 301(e). Appellant would have the Court now discard the standard long since established for such releases and substitute a civil commitment standard in its place.[13]

It hardly seems necessary to reargue the standard of proof compelled by the statute and set forth by the case law in § 301(e) releases. In *Overholser* v. *Leach*, *supra*, at 291, 257 F.2d at 669, this Court found inapplicable the laws governing civil commitments, and found persons in appellant's "exceptional class" under a burden of establishing arbitrariness or capriciousness. In *Ragsdale* v. *Overholser*, *supra*, at 311, 281 F.2d at 946, the Court reaffirmed the *Leach* reasoning, noting in its earlier language that there "a unanimous court held that the person

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[12] See *infra*, Argument IV.

[13] See Appellant's Br. 29-42, especially 39.

seeking release has the 'burden of showing that the refusal of the superintendent to issue the statutory certificate was arbitrary or capricious.'" The Court went on to state:

> "The standard of proof is not expressly defined in the statute and only partially defined in *Leach*. The primary purpose of the statute—protection for the public and for the subject—suggests at once that the burden on the petitioner was intended by Congress to be heavy. The statute deals in terms of the 'foreseeable future' and calls for both a medical evaluation—the certificate—and a judicial evaluation—the finding, before the subject can be released.
>
> "Would the standard of a preponderance of the evidence satisfy the objectives and purposes of Congress? We think not. . . . [I]f an 'abnormal mental condition' renders him potentially dangerous, reasonable medical doubts or reasonable judicial doubts are to be resolved in favor of the public and in favor of the subject's safety." 108 U.S. App. D.C. at 312, 281 F.2d at 947.

Thus, the Court has made clear that given a refusal of certification and an absence of arbitrariness or capriciousness, the requisite proof beyond reasonable medical doubt could not be had. We submit it was not the semantics of phraseology with which the Court was concerned, so much as the substantive burden underlying the term used.[14]

Appellant is unable to cite a single pertinent authority other than *Baxstrom* v. *Herold*, *supra*, with which we have dealt earlier, and *Overholser* v. *O'Beirne*, *supra*, to support his view that the standard of "arbitrariness

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[14] See *Overholser* v. *O'Beirne*, *supra* at 275, 302 F.2d at 860, n.16:

> "In the various hearings held on O'Beirne's petitions for habeas corpus the ultimate issue underlying the question whether the action of the hospital superintendent was arbitrary and capricious was whether O'Beirne had recovered his sanity and was then or in the foreseeable future likely to be dangerous."

and capriciousness" is not the law of the jurisdiction.[15] His characterization of *O'Beirne* as altering *sub silentio* a major element of the statutory scheme accepted and applied both before and after that decision is ill conceived.[16] That case, fully in accord with the decisions setting out the standard of proof required under the statute, did not and was not obliged to reach the issue here posed, for there was "an implicit finding by the District Court that O'Beirne had *not* recovered his sanity and that he was presently or potentially dangerous." (Original emphasis.) 112 U.S. App. D.C. at 275, 302 F.2d at 860, n.16.[17]

In view of the decided nature of the issue, appellant's policy arguments come too late.

IV. The evidence was sufficient to support the district court's finding that appellant was suffering from a mental disease and would be dangerous to himself or others if released.

Appellant's contention that there was insufficient evidence to support the district Court's findings is incorrect.[18]

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[15] Neither *Rosenfield* v. *Overholser*, 104 U.S. App. D.C. 322, 262 F.2d 34 (1958), nor *Hough* v. *United States*, 106 U.S. App. D.C. 192, 271 F.2d 458 (1959), cited by appellant in his footnote at 32 of Appellant's Brief, discusses the question of the burden or standard of proof, and both are therefore inapposite.

[16] See Appellant's Br. 32-34.

[17] Obviously, where a single negative is sufficient, it is unnecessary to add more; *i.e.*, insofar as O'Beirne had been found (1) not sane and (2) dangerous, it was not necessary to find also that the superintendent was being arbitrary or capricious.

[18] See Appellant's Br. 42-45. Here again appellant treats the finding of absence of an "arbitrary and capricious" refusal of certification as a distinct and decisive issue. Appellant apparently is misled by discussion thereof in the oral rulings of the district court. The fact remains that the finding of mental disease and dangerousness is decisive, and the question of "arbitrariness and capriciousness" is here superfluous. Thus, the court found appellant had failed to carry his burden even by a preponderance of the evidence, much less beyond a reasonable doubt.

As to the finding of mental disease, there was medical testimony that appellant then suffered from schizophrenic reaction, chronic undifferentiated type (Tr. 9-10).[19] The fact that this was stated to be in remission does not, as appellant apparently believes, mean it no longer exists (Tr. 9, 11).[20] As to the finding of dangerousness, there was again medical testimony of the probability of appellant's "getting into trouble" if released as he did when originally diagnosed. This likelihood is not subject to the objection of lack of relation to mental illness, in view of the context in which it was uttered (Tr. 17).[21] Of course, reasonable doubts must be resolved against appellant. *Ragsdale* v. *Overholser, supra,* at 312, 281 F.2d at 947.

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[19] See Counterstatement, 4, for the precise medical definition of appellant's condition in Dr. Cameron's return and answer to the rule to show cause.

[20] See Appellant's Br. 43-44. The psychiatrist's statement that appellant's *attitude* was presently one of anger rather than of mental illness does not contradict his conclusion that appellant suffered residuals of mental illness (Tr. 10). Similarly the fact that the illness was not clinically evident at the time does not militate against its existence (Tr. 10-11). Clearly, the psychiatrist's opinion was based on more subtle and compelling factors having to do with his knowledge of the disease and his familiarity with appellant's other manifestations and psychiatric history.

[21] Immediately after stating his opinion on the likelihood of appellant's getting into trouble, the psychiatrist in answer to the question of what he based his opinion on stated:

> "Well, I can't say that Mr. Bresnahan is now psychotic. However, I can't see that he has changed a good deal since the time when he did get into so much trouble." (Tr. 17).

In this regard, see *Overholser* v. *O'Beirne, supra* at 271, 302 F.2d at 855:

> "The dangerous propensities . . . must be related to or arise out of an abnormal mental condition. . . . That . . . may be the precise mental condition which constituted the basis for his acquittal or it may be a residual condition remaining in a patient who has improved."

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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